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In The

Supreme Court of the United States

October Term, 1989

JONAS H. WHITMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF RONALD GENE SIMMONS

Petitioner,

vs.

ARKANSAS, et al.

Respondents.

On Writ of Certiorari
to the Supreme Court of Arkansas

BRIEF FOR THE PETITIONER

ARTHUR L. ALLEN*
(Appointed by this Court)
ALLEN & O'HERN
First Commercial Building
400 W. Capitol, Suite 1700
Little Rock, Arkansas 72201
(501) 375-5040

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment's ban against cruel and unusual punishment requires a mandatory appellate review in all cases in which the death penalty is imposed?

2. Whether a third-party has standing to assert the violation of constitutional rights when the party directly effected does not assert the right?

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court in *Franz v. State* (Simmons I), reported at 296 Ark. 181, 754 S.W.2d 839 (1988), is reprinted in the Joint Appendix at 4.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 193, 766 S.W.2d 422 (1989), reprinted in the Joint Appendix at 29.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 255, 766 S.W.2d 423 (1989), is reprinted in the Joint Appendix at 34.

JURISDICTION

The Arkansas Supreme Court issued its opinion on March 10, 1989, finding that Ronald Gene Simmons could waive his right to appeal and proceed to execution on March 16, 1989. On March 13, 1989, the Arkansas Supreme Court issued its opinion denying Jonas Whitmore the right to intervene in behalf of Ronald Gene Simmons. Jonas Whitmore filed his petition seeking a writ of certiorari on May 3, 1989. This Court has discretionary jurisdiction to review the above two decisions of the Arkansas Supreme Court under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On March 16, 1989, the State of Arkansas was prepared to execute Ronald Gene Simmons for the crime of capital murder. His trial had occurred in February of 1989 and he chose to waive his right to appellate review of the conviction and sentence imposed. No transcript of his trial was prepared and no appellate court reviewed the record to determine whether reversible error had occurred, whether his retained counsel had rendered effective assistance (those counsel advocating then and now the execution of Ronald Gene Simmons), or whether the penalty was arbitrarily and capriciously imposed.

Simmons had previously been convicted of capital murder in May of 1988 and had elected at that time to oppose any attempt to appeal his conviction. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). (Joint Appendix at 4.

Following the first conviction of Simmons (Simmons I for clarity), Fr. Louis Franz, a catholic priest who counsels Arkansas death row inmates, filed a petition with the Arkansas Supreme Court asking to be allowed to proceed as "next-friend" of Simmons to have the Court determine that an appellate review was mandatory in death penalty cases. *Franz v. State*, 296 Ark. 181, 183, 754 S.W.2d 839, 840 (1988).

After receiving briefs from the parties, the Arkansas Supreme Court ruled that "there is no mandatory appellate review in Arkansas", *Franz, id.* at 186, 754 S.W.2d at 842 and that the absence of a mandatory appeal did not render the Arkansas death penalty statute unconstitutional. *Franz, id.* at 186-188, 754 S.W.2d at 842-843.

The Arkansas Supreme Court fashioned a rule in Simmons I which required the trial court to conduct a hearing as to the defendant's competency to waive appellate review (a standard similar to that set forth in *Rees v. Peyton*, 384 U.S. 312 (1966), which equates to the test for competency to stand trial). *Franz, id.* at 188-189, 754 S.W.2d at 843. Finding Simmons competent under this test, a mandate issued and Simmons had an execution date set. A federal habeas corpus action was filed (*Franz v. Lockhart*) and Simmons I is currently on appeal to the United States Court of Appeals for the Eighth Circuit following a ruling by the United States District Court that Fr. Franz lacked standing to proceed as "next-friend". *Franz v. Lockhart*, 700 F.Supp. 1005 (E.D. Ark. 1988).

In accordance with its earlier holding in Simmons I (*Franz v. State*, 296 Ark. 181 (1988)), the Arkansas Supreme Court accepted Simmons' waiver of his right to

appeal in his second conviction (Simmons II, the instant case), *Simmons v. State*, 298 Ark. 193, 766 S.W.2d 422 (1989) (J.A. at 29) and denied the motion of Jonas H. Whitmore to proceed as "next-friend" of Simmons. *Simmons v. State*, 298 Ark. 255, 766 S.W.2d 423 (1989). (J.A. at 34)

On March 15, 1989, this Court granted a stay of execution pending the filing of a petition for certiorari and the petition was granted on July 3, 1989.

SUMMARY OF THE ARGUMENT

Prior decisions of this Court have implicity found that a mandatory appellate review of death penalty cases is necessary to insure that such sentences are not arbitrarily or capriciously imposed, *Gregg v. Georgia*, 428 U.S. 153 (1976). These holdings have been predicated upon the fact that "death differs from all other forms of punishment", *Furman v. Georgia*, 408 U.S. 241 (1972) and that "careful scrutiny", *Zant v. Stephens*, 462 U.S. 862 (1982), must be made of the imposition of such penalty.

Arkansas is the only state with a death penalty statute which does not, by statute or caselaw require a mandatory appellate review of cases in which the death penalty is imposed. Because the protections of the Eighth Amendment are not static, but instead reflect society's "evolving standards of decency", *Trop v. Dulles*, 356 U.S. 86 (1958), the system in use in Arkansas is constitutionally defective in that it has not kept apace of those maturing standards.

Appellate review of death penalty cases serves as an important check against the arbitrary and capricious imposition of the sentence in both Arkansas and other states having this sanction. The Arkansas Supreme Court, by available figures, has reversed or reduced the sentence in over 40% of the capital cases reviewed during a recent six year period and this important safeguard should not be bypassed upon the whim or caprice of the individual defendant. Without such review, a substantial risk exists that both the innocent and the illegally convicted could be executed and this would be intolerable for an irrevocable penalty.

The right to "waive" a constitutional protection is not absolute, *Singer v. United States*, 380 U.S. 24 (1965), and the waiver of appellate review in a capital case is contrary to public policy in that society has a more compelling right to insist that this most severe penalty is imposed only on those eligible and deserving of it. The police power of the State requires it to override individual desires when the greater needs of its citizens are endangered.

The Petitioner Jonas H. Whitmore has standing to assert this violation of a constitutional right as it directly involves his right as a citizen of the state to the public interest rights conferred under the Eighth Amendment to protect society from having cruel and unusual punishment imposed in its name. He also has standing because he is subject to the "comparative review" afforded in capital cases by the Arkansas Supreme Court which would be rendered meaningless without a complete data base. Alternatively, because of the important societal interest involved in the imposition of the death penalty

and because the violation would otherwise be without a remedy, the stricter standards of "standing" should be relaxed in this instance.

ARGUMENT

I. The Eighth Amendment's Ban Against Cruel and Unusual Punishment Requires a Mandatory Appellate Review in Death Penalty Cases Which Cannot Be Waived By the Defendant.

The Petitioner Whitmore will herein define "mandatory appeal" as being one which the defendant may not waive; this contrasts to "automatic appeal" which will be defined as one which the defendant may not be precluded from pursuing, but which he may knowingly and intelligently waive. Arkansas has "automatic appeal" in all criminal cases, but no "mandatory appeal" in any case. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). (J.A. at 9).

Since the reinstatement of the death penalty in 1976 (*Gregg v. Georgia*, 428 U.S. 153 (1976)), only one individual has been executed without appellate review of his conviction (Gary Gilmore in Utah on January 17, 1977) and Respondent State of Arkansas asks that Ronald Gene Simmons become, after an interval of thirteen years, the second to so die. The position of the State of Arkansas is wrong for at least four reasons: First, this Court has already determined that a meaningful appellate review is essential to a constitutionally sound death penalty scheme: secondly, the absence of a mandatory appellate review in capital cases does not comport with the "evolving standard of decency that marks the progress of a

maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958); thirdly, the Arkansas death penalty statute is subject to being arbitrarily and capriciously imposed in the absence of meaningful appellate review; and fourthly, any waiver of appellate review in a capital case is contrary to public policy and adverse to the rights of society as a whole.

A. Prior Decisions of This Court Have Clearly Established That a Meaningful Appellate Review Is an Essential Element of Any Valid Death Penalty Statute.

The Eighth Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment (*Robinson v. California*, 370 U.S. 660 (1962)), provides that cruel and unusual punishment shall not be inflicted. The concerns of the Eighth Amendment have generally been heightened in the area of capital punishment because of the recognition that "the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its irrevocability." *Furman v. Georgia*, 408 U.S. 241, 306 (1972) (Stewart, J. concurring).

Following the reenactment of various state death penalty schemes in the period following *Furman, id.*, this Court, while often sharply divided in its decisions, has been consistent in holding that "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1982). One of the strongest concerns in the imposition of the death penalty, and a core holding of *Furman v. Georgia*, 408 U.S. 241 (1972), is that this unique punishment not "be so wantonly and so freakishly imposed"

(Stewart, J. concurring, at 310), and that it not be subject to unbridled discretion by the jury (White, J. concurring, at 310-314).

Gregg v. Georgia, 428 U.S. 153 (1976), found the new Georgia death penalty scheme constitutionally acceptable based upon its bifurcated trial procedure, and that

> (A)s an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance and whether the sentence is disproportionate to those sentences imposed in similar cases.
>
> *Id.* at 198

Two other cases decided that term also found appellate review to be an important check against the arbitrary and capricious imposition of the death penalty; *Jurek v. Texas*, 428 U.S. 262, 276 (1976) and *Proffitt v. Florida*, 428 U.S. 242, 250-251 (1976).

Later decisions of this Court have served to re-emphasize and give continued vitality to the "safeguard" of mandatory appellate review discussed in *Gregg*: "[O]ur decision in this case [upholding Georgia death penalty statute] depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assume proportionality," *Zant v. Stephens*, 462 U.S. 862, 889 (1982); "[*Gregg v. Georgia*] suggested that some form of meaningful appellate review

is required," *Pulley v. Harris*, 465 U.S. 37 (1984). The importance of the appellate process was discussed again in 1987, *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The one ostensible anomaly to this consistent recognition of the importance of appellate review in death penalty cases is found in *Gilmore v. Utah*, 429 U.S. 1012 (1976), wherein the individual sentenced to death declined to exercise any appeal of his sentence, and opposed the intervention by his mother as "next-friend." After granting a stay of execution, this Court later lifted the stay after finding that Gilmore was competent to waive his appeal and that his mother had no standing to assert his rights. With four justices dissenting, Mr. Chief Justice Burger noted that the question of whether Gilmore should be allowed to waive his appeal "simply is not before us." *Id.* at 1017. *Gilmore* is not dispositive on the issue of mandatory appeal but is, instead, relevant only to the issue of third-party standing and for reasons cited *infra* should be distinguished from the instant case as it did not involve the question of a constitutionally mandated appellate review nor does its holding reflect current societal standards of decency. The arguable interpretations of *Gilmore* are simply not relevant to the issues of this case.

The Arkansas Supreme Court and the Respondent State of Arkansas in this case have misinterpreted both the issues of *Gilmore* and its precedential value on the question of mandatory appeal. In its opinion in *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988) (Simmons I), the Arkansas Supreme Court failed to look beyond *Gilmore* and did not give careful consideration to the holdings of *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428

U.S. 242 (1976) or *Jurek v. Texas*, 428 U.S. 262 (1976). It rejected the argument of mandatory appeal by simply noting that:

> The idea that in *Gregg, Proffitt*, and *Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore v. State of Utah*. (cite omitted)
>
> *Franz v. State*, 296 Ark. at 187, 754 S.W.2d at 842, quoting from *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977)

The Respondent State of Arkansas, by asserting that mandatory appeal is not constitutionally required, asks this Court to roll the calendar back to a pre-*Furman* era where the most egregious violations of fundamental rights would go uncorrected solely upon the desire, however sincere, of the condemned to "take his punishment." Of more frightening implication in the constitutional context than the desire for absolution by punishment, is the belief by one writer on the subject that "most capital defendants are concerned about maintaining their tough, indifferent images. That leads some of them to demand the death penalty in order to show they are not afraid of it." W. White, *The Death Penalty in the Eighties*, 153 (1987).

A system which does not provide mandatory appeal renders our entire criminal justice system meaningless against even the most capricious whim of an accused or of the sentencing body. This is contrary to the more reasoned concern uniformly expressed by this Court:

> Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of the sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.
>
> *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2687, 2710 (1988) (O'Connor, J., concurring)

Appellate review of a capital sentence is an "integral component of a state's 'constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty'." *Murray v. Giarratano*, ___ U.S. ___ (No. 88-411, June 23, 1989) (Stevens, J., dissenting at ___ U.S. ___, 45 Crim. Law Reporter 3155, 3161 quoting from *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (footnote omitted). Only when that "calm reflection" has occurred, may a presumption of "finality and legality attach[ ] to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

B. A Mandatory Appellate Review of Death Penalty Cases Is Necessary to Reflect Contemporary Standards of Decency.

Arkansas is the only state with a death penalty statute which does not, by statute or caselaw, mandate a nonwaivable appellate review of either the conviction or the sentence imposed. See, generally, statutes footnoted in Carter, *Maintaining Systematic Integrity in Capital Cases*, 55

Tennessee Law Review 95, 114 n. 116 (1987) and U.S. Department of Justice Bureau of Justice Statistics Bulletin, *Capital Punishment, 1986* (1987).

Following the execution of Gary Gilmore in Utah on January 17, 1977, the State of Utah amended its Criminal Code in the 1977 session of its legislature to provide for automatic review of death penalty cases; Utah Code Anno. (1953) § 76-3-206 as amended by L.1977, Ch.84, § 1. Gilmore, the first person to be executed in the United States following *Gregg v. Georgia,* 428 U.S. 153 (1976), remains the only person to have been executed without appellate review. That sentence could not today be carried out under Utah law without such review.

It is well accepted that Eighth Amendment rights draw their "meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). Several state courts have reviewed the question of waiver of direct appeal in capital cases and have found such waiver to be contrary to public policy (as discussed *infra*).

There must be a strong presumption that the "public policy" of the thirty-six other states with capital punishment schemes reflects the "evolving standard of decency" (*Trop v. Dulles, id.*) that exists today. While it is arguably true, as the State of Arkansas contends, that "a show of hands does not necessarily establish an Eighth Amendment requirement" (Respondent's Brief in Opposition of Writ of Certiorari at 4, interpreting *Spaziano v. Florida,* 468 U.S. 447 (1984)), when a minority of one is in opposition to thirty-six there is reason to believe that the majority reflects the more widely held beliefs of society in general.

These evolving standards breathe life into our Constitution and allow it to be far more than an "ephemeral enactment[ ], designed to meet passing occasions." *Weems v. United States,* 217 U.S. 349, 373 (1910). This Court has recently recognized that the accepted standards of 1976 do not necessarily reflect the required standards of today; *Penry v. Lynaugh,* ___ U.S. ___, (No. 87-6177, June 26, 1989) which reversed, based upon a defect in the same Texas statute which had been upheld in *Jurek v. Texas,* 428 U.S. 262 (1976).

C. The Arkansas Death Penalty Statute Is Subject to Being Arbitrarily And Capriciously Imposed In The Absence of Mandatory Appellate Review.

During the period from 1983 through February of 1989, the Arkansas Supreme Court has affirmed 57.8% (11 of 19) cases on direct appeal wherein the death penalty was imposed. *Fretwell v. State,* 289 Ark. 91, 99, 708 S.W.2d 630, 634 (1986) Hickman, J., concurring) and *Robertson v. State,* 298 Ark. 131, 137, 765 S.W.2d 936, 940 (1989) (Hickman, J., concurring). In the absence of a record of the trial of Ronald Gene Simmons or an appellate review of that record, neither Petitioner Whitmore nor Respondent State of Arkansas can determine whether Simmons is within the more than 40% of those illegally convicted or sentenced.

Available figures from other jurisdictions with death penalty statutes suggest that appellate review plays an equally important role nationwide in protecting against the arbitrary and capricious imposition of this sanction. Dix, *Appellate Review of the Decision to Impose Death,* 68

Georgetown Law Journal 97 (1979) shows that the Georgia Supreme Court invalidated or reduced the death sentence in 25% of the cases decided on direct appeal during the period between April 4, 1974 and March 6, 1979. *Id.* at 111. For a comparable time period the Florida Supreme Court reversed or reduced 50% of its death penalty cases reviewed (*Id.* at 125) and Texas reversed 33% of its capital cases (*Id.* at 145). The New Jersey Supreme Court has reportedly reversed 100% of the capital cases reviewed by it within the past year (Source: Office of the New Jersey Public Defender, Arlie Conference on the Death Penalty, August 3-6, 1989.) Some authorities on the subject have estimated that as many as 60% of those sentenced to death since *Furman* were subject to having their sentences invalidated. Greenburg, *Capital Punishment As A System*, 91 Yale Law Journal 908 (1982) and Strafer, *Volunteering For Execution: Competency, Voluntariness and The Propriety of Third Party Intervention*, 74 Journal of Criminal Law and Criminology 860, 898 (1983).

The absence of mandatory appellate review skews and distorts the system of checks and balances between the branches of a triumvirate government and leaves the legislative and executive branches free to enact and enforce laws without the certainty of judicial review. See, for example, *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734 (1988) wherein the Arkansas Supreme Court remanded a capital case upon a finding that the aggravating circumstance that the crime was "committed in a especially heinous, atrocious, or cruel manner" was constitutionally defective; this Court subsequently reaching a similar result in *Maynard v. Cartwright*, 486 U.S. ___, 108 S.Ct. 1853 (1988). Upon retrial of the penalty phase Wilson was

sentenced to life without parole (unpublished opinion, Pulaski County Circuit Court, First Division, 1988).

The Arkansas Supreme Court has proven the importance of its appellate review in a number of other death penalty cases. See, for example, *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988) reversed for admission of statement taken after arrest without probable cause – sentenced to life without parole on retrial; *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987) reversed for *Batson v. Kentucky*, 476 U.S. 79 (1986) error in selection of jury – sentenced to life without parole on retrial; *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983) reduced to life without parole because of the insufficiency of the evidence at the penalty phase of the trial. These few cases are illustrative of the potential harms which could go unremedied without mandatory appellate review in capital cases.

The severest penalty that can be imposed by a society "must be accompanied by unique safeguards to ensure that it is a justified response to a given offense", *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part). A mandatory appellate review, far from being a unique response, is a minimal standard to insure the avoidance of the arbitrary and capricious imposition of the death penalty.

D. Allowing a Waiver of Appellate Review in Capital Cases Is Contrary to Public Policy And Adverse to the Rights of Society.

Within the context of criminal law, "waiver" ("an intentional relinquishment or abandonment of a known right or privilege", *Johnson v. Zerbst*, 304 U.S. 458, 464

(1938)) of certain rights by an accused has been recognized as accomplishing the goals of respecting the free choice of a defendant and of allowing the "system" to operate more efficiently and cheaply. See Kaine, *Capital Punishment and the Waiver of Sentence Review,* 18 Harvard Civil Rights Civil Liberties Law Review 483, 497-8 (1983). Were these the only questions to be addressed, it is clear that Mr. Simmons' wish to be executed without appellate review, if carried out, would respect his choice and be less costly for the State of Arkansas. Far more weighty considerations, however, arise when the attempted waiver is of the review of the imposition of the death penalty.

May an accused waive any or all rights afforded under the Constitution, and if not, why not? The answer is most obviously that he may not waive all rights; *Singer v. United States,* 380 U.S. 24 (1965) makes it clear that a defendant may not waive his right to jury trial without the consent of the court and of the prosecution ("[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Singer, Id.* at 34-35. Nor may an accused assert a right to plead guilty to any criminal charge absent a determination of a factual basis for the plea (Federal Rules of Criminal Procedure, Rule 11 and Arkansas Rules of Criminal Procedure, Rule 24.6; *McCarthy v. United States,* 394 U.S. 459 (1969)).

Even in the instance of rights which may be waived, such right to waiver is not absolute: Implicit in the Sixth Amendment's right to assistance of counsel is the right to self representation (*Faretta v. California,* 422 U.S. 806

(1975)) but that right is not absolute when it would jeopardize the integrity of the criminal justice system.

A separate line of cases has established that a waiver of constitutional rights is impermissible when that waiver violates the rights of third parties. *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980) held that the public's right to receive information about the criminal justice system restricted the right of a defendant to waive his right to public trial.

A public right to assurance that the death penalty is not arbitrarily or capriciously imposed may be inferred from the existence of such procedure in the remaining thirty-six states that allow such punishment as well as from the case law within those states recognizing that this public interest overrides any right to waiver by the defendant.

> We recognize, of course, that the doctrine of waiver is, in our adversary system of litigation, indispensable to the orderly functioning of the judicial process. There are, however, occasional rare situations where an appellate court must consider the interest of society as a whole in seeing to it that justice is done . . . . One such instance is surely the imposition of capital punishment . . . . It is evident that. . . . McKenna personally prefers death to spending the remainder of his life in prison. . . . the waiver concept was never intended to serve as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide.
>
> *Commonwealth v. McKenna,* 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (1978)

Other state courts have reached similar results when weighing the wishes or rights of the convicted against the greater rights of society:

> [w]e are not dealing with a right or privilege conferred upon the litigant for his sole personal benefit. We are concerned with a principal of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual.
>
> *People v. Stanworth*, 71 Cal.2d 820, 834, 457 P.2d 889, 899 (1969) denying waiver of appellate review.

See also *Evans v. State*, 361 So.2d 654 (Ala. 1978); *Goode v. State*, 365 So.2d 381 (Fla. 1978) for state decisions upholding the public policy behind mandatory appellate review.

As an adjunct to the public policy behind appellate scrutiny of death sentences, is the question of whether the police power of the State to protect its citizens from self-destructive acts can subjugate the individual rights of the citizen. Obviously, again the answer is yes. The police powers of the states allow, if not compel, them to safeguard public health, safety, welfare, and morals. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905), and this power controls many aspects of our daily lives from the speed at which we drive or whether motorcyclists wear helmets to weightier issues of compelled blood transfusions (*Jehovah's Witnesses of Washington v. King County Hospital*, 390 U.S. 598, *reh'g denied*, 391 U.S. 961 (1967)). It is a proper and necessary part of the police power of the State

to compel review of capital cases to insure the fundamental fairness guaranteed to all citizens of the state that none among them shall be deprived of life without due process of law.

Several commentators on the subject have advocated that the decision to forego protracted appellate review should be equated to "death with dignity" by a terminally ill patient. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision*, 54 Southern California Law Review, 575 (1981) and Urofsky, *A Right to Die: Termination of Appeal For Condemned Prisoners*, 75 Journal of Criminal Law and Criminology 553 (1984). This argument is fallacious for several reasons: the death of a terminally ill patient is, by definition, inevitable while that of the death row inmate is not; the death of the terminally ill is not occasioned by an act of the State; and even that decision must involve a balancing of interests, *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976). Even the most vigorous of these advocates concede that an appellate review is appropriate before the "right to die" ensues (Urofsky, *A Right to Die, Id.*, at 581).

Nor can it be argued that the system approved in Arkansas for waiver of appeal in capital cases meets the test of the "knowing relinquishment of rights". Who has informed Mr. Simmons of trial error: his attorneys who advocate his death? the trial judge who, presumably, ruled on questions of evidence?

And who has informed Mr. Simmons as to whether he received effective assistance of counsel at the trial? One state court has found that failure to present mitigating evidence because of the wishes of the defendant

necessitated reversal of the penalty on ineffective assistance of counsel grounds because of the "fundamental public policy against misusing the judicial system to commit a state-aided suicide." *People v. Deere*, 41 Cal.3d 353, 363, 710 P.2d 925, 930 (1985). The trial counsel in *Deere*, at least, argued for life imprisonment. A "waiver" made with assistance of counsel who are advocating the death of their own client cannot conceivably rise to the level of being knowing and intelligent.

Ronald Gene Simmons was tried and convicted in a small rural town in Arkansas and sentenced to death. The people of the State of Arkansas have a compelling public interest in knowing that that sentence is both legal and appropriate and that need surpasses any arguable right of Simmons to forego appellate review.

II. The Petitioner Whitmore Has Standing To Assert A Constitutional Violation When That Violation Would Otherwise Be Without A Remedy, And When He Is Directly Effected By That Violation.

The statutory scheme in Arkansas for the imposition of the death penalty is constitutionally defective in that, for reasons cited *supra*, it does not provide mandatory appellate review in capital cases. The position of the Respondent is that no one should be allowed to seek redress of this violation; they not only decline to send anyone to learn for whom the bell tolls, they refuse to even hear the bell.

Even under the strictest interpretations of the limitations imposed upon this Court under its Article III

powers ("[we do not consider] generalized grievances about the conduct of government". *Flast v. Cohen*, 392 U.S. 83, 106 (1968)), the Petitioner Whitmore has standing to assert constitutional violation as it directly involves rights afforded to him by the State of Arkansas. Although himself confined to death row in the Arkansas prison, Whitmore is a citizen of the State of Arkansas who is entitled to the public interest protections of the Eighth Amendment. This interest is the equivalent of the public interest found in First Amendment cases conferring "standing" upon third parties; *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). Whitmore, like all other citizens of the state, has a direct, adversarial right, to require that an execution which is carried out in the name of "the people of the State of Arkansas" has not been imposed arbitrarily or capriciously.

Although not constitutionally required, the Arkansas Supreme Court has committed to a system of comparative review in death penalty cases (". . . .we must compare the wickedness, inhumanity, and heinousness of this capital case with other capital cases." *Whitmore v. State*, 296 Ark. 308, 316, 756 S.W.2d 890, 895 (1988). Petitioner has a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case.

If, *arguendo*, the Petitioner's assertion of standing on traditional grounds is deemed inadequate, he would argue that an exception should be made in the present case, as this Court has, in past cases, recognized that the strict requirement of standing is, in some applications, only a "rule of practice" and that exceptions may exist

"where there are weighty countervailing policies", *United States v. Raines*, 362 U.S. 17, 22 (1960), citing *Barrows v. Jackson*, 346 U.S. 249 (1953) and *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). It follows from the peculiar features on the merits of the mandatory appeal claim that such countervailing policies are present in the case at hand, and standing should thereby be granted.

Such weighty policy considerations have often been found to exist in the area of First Amendment rights: *Eisenstadt v. Baird*, 405 U.S. 438 (1972) ("one who acted to protect the rights of a minority and the minority itself" *Id.* at 445); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) ("we have fashioned this exception to the usual rules governing standing" [cite omitted] because of the " . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application". [cite omitted]. *Id.* at 486-487.

Like the relaxation of standing in the area of the First Amendment, the requirements for standing in the present case should be relaxed as well as a precaution against the inhibitory effect on Eighth Amendment due process protections, which also exist to protect the greater rights of society in assuring that punishments inflicted not be arbitrarily imposed.

In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court indicated that standing of third parties would be allowed where there was a closeness of the relationship between the litigant and the person whose right he seeks to assert, and an inability of the third party to assert his own right. In *Wulff*, a physician was seeking third party standing to

assert the rights of women patients as against governmental interference with abortion decisions. In allowing third party standing, the Court explained that a potential obstacle to a party asserting his own rights might be the "imminent mootness" of the individual's claim were it not heard by the Court through the standing of the third party petitioner.

In the present case, the threat of mootness is equally impending; if the Petitioner is not granted standing, Simmons will be executed without the constitutionally required mandatory appellate review, and the question of whether Arkansas' law passes constitutional muster will no longer be open to address by the Court. "Execution of the condemned prisoner obviously would moot his claims." Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Criminal Law & Criminology 860, 911, n. 223 (1983). "The unique severity of the death sentence and the public interest in its imposition" demands that it be carried out pursuant to no less than constitutionally minimum standards. *Franz v. State*, 296 Ark. 181, 199, 754 S.W.2d 839, 849 (1988) (Hays, J. dissenting). (J.A. at 26)

Quoting United States District Judge G. Thomas Eisele in the case of *Franz v. Lockhart*, 700 F.Supp. 1005 (E.D. Ark., 1988):

> What is at stake here is our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name. It is because of the crying need to vindicate that right, that basic value, that Simmons should be held unable "to waive resolution in state courts" [cite omitted] of the correctness of his death sentence. *Id.* at 42-43.

Another compelling reason for a departure from the traditional rules of standing in the present case is that in similar situations the Court has held that the rule's rationale disappears when a "statute in question has already been declared unconstitutional in the vast majority of its intended applications." *United States v. Raines*, 362 U.S. 17, 22 (1960). Of the thirty-seven states authorizing capital punishment, only Arkansas fails to provide for mandatory appellate review of either the entire or the sentencing phase (*Franz v. State*, 296 Ark. 181, 196-197, 754 S.W.2d 839, 847-848 (1988) (Glaze, J. dissenting). (J.A. at 22) The statutory schemes in the other jurisdictions have arisen from their interpretations of *Furman v. Georgia*, 408 U.S. 241 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976) and are analogous to a finding by each of these states that both public policy and constitutional considerations would render any statute without such a provision to be invalid.

In another case, *United States v. Reese*, 92 U.S. 214 (1875), the Court struck down a statute dealing with voting rights, and in so doing, the Court permitted a party to prevail by asserting the rights of third parties. Even though the Court spoke in terms of severability, it implicitly decided a standing question, that the defendant could challenge the validity of a statute despite the fact that as applied to him, it was constitutional. Similarly, in *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), where a statute was declared constitutionally infirm because a defendant might not receive notice of a suit against him, the petitioner, although he received notice in the actual suit and was thereby not prejudiced by the statutory weakness,

was nevertheless allowed to assert the statute's unconstitutionality on the ground that other defendants might not receive notice under it. These examples of litigants having prevailed by showing that a statute violated the constitutional rights, not of themselves, but of third parties, are examples of exceptions the Court has allowed to the general rule that a party does not have standing to assert unconstitutional application of a statute to another.

In the present case the Petitioner is attempting, similarly, to assert that Arkansas' death penalty statute is unconstitutional as applied to third parties (i.e. Simmons) coming within its terms. And similarly to the previously cited instances, the perpetuation of significant societal values calls for a relaxation of the traditional standing requirements.

"Rather than recognizing no rule for the courts when societal rights are abridged, standing ought to be accorded to citizens. Societal rights embody promises that the sovereign has made in return for exacting the duties of citizenship." Dow, *Standing and Rights*, 36 Emory Law Journal 1195, 1216 (1987)

In the present case, to allow the State of Arkansas to enforce its unconstitutional death penalty statutes in the execution of Simmons, can be seen as an encroachment upon societal rights to live in a civilized community free from deprivation of life without due process of law. Such a violation cries out for a relaxation of the traditional notions of standing to allow the merits of the Petitioner's case to be heard by this Honorable Court.

CONCLUSION

For the reasons and authorities cited above, the decision of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

ARTHUR L. ALLEN*
(Appointed by this Court)
ALLEN & O'HERN
First Commercial Building
400 W. Capitol, Suite 1700
Little Rock, Arkansas 72201
(501) 375-5040

Counsel for Petitioner

*Counsel of Record